Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

JANE RINI,
PETITIONER,

v.

UNITED VAN LINES, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Carmack Amendment to the Interstate Commerce Act implicitly preempts all state law causes of action for damages incurred by a shipper of household goods when those damages are separate and distinct from the loss of the shipper's goods in transit.

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PETITION FOR A WRIT OF CERTIORARI

Jane Rini respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals written by the Honorable Juan R. Torruella (A. 1) is reported at 104 F.3d 502 (1st Cir. 1997). The opinion of the district court written by the Honorable Michael A. Ponsor (A. 12) is reported at 903 F. Supp. 224 (D. Mass. 1995).

JURISDICTION

The court of appeals entered judgment on January 19, 1997, reversing in part a judgment for petitioner dated November 1,

1995. A petition for a rehearing en banc was denied on February 19, 1997. A. 31 The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the 1906 Carmack Amendment to the Interstate Commerce Act of 1887, which was recodified in 1978 as follows:

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier . . . [is] liable to the person entitled to recover under the bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States . . . when transported under a through bill of lading. 49 U.S.C. § 11707.
>
> The Interstate Commerce Commission may require or authorize a carrier providing transportation or service subject to its jurisdiction . . . to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by written agreement, when that value would be reasonable under the circumstances surrounding the transportation. 49 U.S.C. § 10730(a).
>
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law. 49 U.S.C. § 10103.

STATEMENT OF THE CASE

A. *STATEMENT OF FACTS*

This case arose when Petitioner, Jane Rini hired the Respondent, United Van Lines ("United"), to transport her household goods from her residence in Myrtle Beach, South Carolina to her new home in Northampton, Massachusetts. Among petitioner's belongings were eleven pieces of valuable artwork that had been in her family for several generations. United's employees packed some of petitioner's possessions, including this artwork. Her belongings were then transported to Northampton.

When the moving van was unloaded in Northampton, petitioner checked off the number of each box that came into her home on inventory sheets provided by United. When the movers finished unloading, petitioner noticed that several of the boxes on the inventory sheets were not checked off. She brought this to the van driver's attention. He made a quick search through the house, but refused to look for all of the unaccounted-for boxes. He further told petitioner that she had to sign the inventory sheets before he would allow her to open any of the boxes. He claimed that until she signed the inventory sheets reflecting that she had received all of her possessions, her property belonged to United. As a result of what the lower court judge found to be the driver's "deliberately belligerent and intimidating . . . manner," (A. 15) petitioner signed the inventory sheets.

The next day petitioner began unpacking. When she opened boxes on which United's packers had written the word "artwork," she discovered that the artwork was not inside. Moreover, a box named "Orange Box 77," labeled by the packers as containing artwork on the inventory sheets, was not in her new home. In all, eleven pieces of art were missing: a pair of Chippendale mirrors; a Mezzotint of the Virgin Mary; an ivory crucifix; three silk embroideries on paper; and four small paintings. None of these items was ever recovered.

After discovering that her artwork was missing, petitioner immediately called United's driver to report the loss. He responded by calling petitioner a "liar." Petitioner filed a formal claim for her missing artwork on October 2, 1990. Her claim informed United of the importance of the missing items to her and said she was "heartsick" about the loss. Ten days later, petitioner provided United with slides of ten of the eleven pieces of artwork.

Petitioner's claim was referred to Eric Hartman, a United claims adjustor. Hartman assured petitioner he would launch an immediate investigation. Instead, according to the trial judge, he did "next to nothing." A. 18 He failed to contact the packers, the last people to see the missing artwork. He failed to take a written statement from the driver, although he testified that he deemed such a statement as necessary to a thorough investigation. He failed to learn the identities of, let along speak to, the men who helped the driver unload the van in Northampton. He failed to make a single phone call to determine whether petitioner's possessions may have been mistakenly unloaded on the two stops the moving van made before it arrived in Northampton.

Hartman's investigation instead focused on demanding documentation from petitioner regarding the value of her lost artwork. He persistently requested canceled checks and credit card receipts, even though petitioner informed him from the outset that no such documentation existed because the items were gifts that had been in her family for many years. The trial judge found that Hartman's strategy was to "set up Rini's claim for rejection by making demands for documentation that he was repeatedly told, did not exist." A. 18 This intention was documented in a note Hartman made to himself during a meeting with United's in-house lawyers and management regarding petitioner's claim. The note said "maintain denial after talking with packers," reflecting Hartman's intention to deny petitioner's claim no matter what his "investigation" revealed.

On July 8, 1991, Hartman wrote to petitioner formally denying any compensation for her claim. His reason for the denial was that petitioner had not proven that United had lost any of her possessions, and that in any event, she could not substantiate the value of her claim. Petitioner thereafter obtained appraisals of her missing artwork by submitting slides made from her personal photographs of the artwork to experts in the field. She submitted these appraisals to United, but it again denied her claim, asserting that it had delivered all of her possessions. United denied petitioner's claim in its entirety for a third time in December, 1991.

In the summer of 1992, petitioner consulted present counsel's office about a real estate matter. Still disturbed and frustrated by United's failure to honor her claim in any way, she informed counsel of her difficulties. As a result of that conversation, on October 8, 1992, petitioner's attorney wrote a letter to United on her behalf, asserting a claim under the Massachusetts Consumer Protection Law.

United once again denied petitioner's claim in its entirety. The stated reasons for denial were that petitioner had signed for her shipment and there was no evidence that United failed to deliver the artwork, a conclusion that the trial judge later called "simply absurd." A. 20 United then filed a Declaratory Judgment Action in the United States District Court in South Carolina, seeking to forestall petitioner from filing suit in Massachusetts on her claim. Petitioner was forced to hire counsel in South Carolina to defend this suit before it was dismissed as an improper use of the Declaratory Judgment Act. On December 22, 1992, petitioner filed the suit underlying this petition in the United States District Court in Springfield, Massachusetts.

B. *PROCEEDINGS BELOW*

Petitioner's complaint in the district court alleged a federal cause of action to recover for the loss of her possessions by United under the Carmack Amendment. She also pled state

law claims of negligence, misrepresentation, intentional infliction of emotional distress and violation of MASS. GEN. L. CH. 93A, a state consumer protection statute, relating to United's conduct both before petitioner's move and during the claims process.

From the outset of the litigation, United asserted that all of petitioner's state law claims were preempted by the Carmack Amendment. It filed Motions to Dismiss and for Partial Summary Judgment, arguing that the Carmack Amendment precluded all remedies other than compensation for the actual value of the goods shipped or for the value declared by the shipper in the bill of lading. 49 U.S.C. §§ 11707, 10730. Both motions were denied by the trial court on the ground that injuries inflicted by a carrier, either before the transport or during the claims process, were compensable under state law. Accordingly, at trial, the court instructed the jury that it could consider petitioner's claims of negligence, misrepresentation and intentional infliction of emotional distress only insofar as they involved the claims process and only insofar as they involved an injury distinct from the loss of her goods.

After an eight day trial before Judge Michael A. Ponsor, the jury answered special verdict questions specially crafted by the trial judge to make the aforementioned distinction. The jury awarded petitioner $50,000.00 in compensatory damages on her claim under the Carmack Amendment and $100,000.00 on the negligence and misrepresentation counts. After further hearings and the submission of briefs, Judge Ponsor determined that petitioner had prevailed on her claim under MASS. GEN. L. CH. 93A. Because of what he termed the "extreme egregiousness" of United's conduct, he trebled petitioner's damages and awarded her attorneys' fees pursuant to the statute. United then filed a timely notice of appeal of the judgment on the state law counts.

After briefing and argument in the First Circuit Court of Appeals, that court determined in an opinion by Chief Judge Torruella that petitioner's state law claims were in fact preempted by the Carmack Amendment and reversed the

judgment on the state law claims entered below. The Court acknowledged that there was no legislative history available to steer its inquiry regarding the intent of Congress to preempt state law claims such as petitioner's. A. 4 It also recognized that previous Supreme Court cases did not provide clear guidance on the preemptive reach of the Amendment. A. 5 Nonetheless, the Court gleaned the intent to preempt petitioner's state law remedies from its interpretation of the purpose of the statute and the existence of procedural regulations governing the claims process.

Petitioner filed a timely petition for rehearing en banc on January 30, 1997. This petition was denied on February 19, 1997. A. 31

REASONS FOR GRANTING THE PETITION

Every year, thousands of individuals and families move their belongings from one home to another via common carriers such as United. In addition, tons of materials are transported by means of common carrier for business purposes every day. In the course of all of this movement, some articles inevitably are lost or damaged and claims are made. According to a report of the Interstate Commerce Commission, ("ICC") in 1990 alone, more than 40,000 claims were filed by shippers against carriers.

When those claims are made, some shippers are mistreated, ignored, deceived and denied any compensation for their loss. For instance, the trial court in this case, in findings undisturbed by the First Circuit, found United's claims process to be "a whitewash," (A. 20) "unfair," (A. 16) "a flat sham," (A. 17) and "unethical." A. 27 *See also, Cleveland* v. *Beltman North American Co., Inc.*, 30 F.3d 373, 374 (2d Cir. 1994) *cert. denied*, 115 S.Ct. 901 (1995) (remarking that "[i]n handling plaintiffs' claims, the moving company — in a deliberate and determined effort to frustrate plaintiffs' collection of damages for their losses — was guilty of foot-dragging and stonewalling."); Andrea Adelson, Boxing Up a Life and

Moving It Requires Caution and Cash, N.Y. TIMES, Dec. 23, 1995 at F8 (describing the difficulties and abuse shippers of household goods can encounter when submitting a claim).

Thus, the factual issues raised in *Rini* are issues that have and will continue to resurface routinely for both individual consumers and businesses.[1] In cases such as these, claimants naturally turn to state consumer protection statutes and common law causes of action designed to protect them against unfair and deceptive treatment by businesses.

Claimants, however, have found this road to redress blocked. Prior to the *Rini* decision, a number of circuit courts of appeal decided that the Carmack Amendment preempted all state causes of actions for injuries inflicted during the course of a consumer's relationship with a moving company beyond recovery for the value of lost or damaged goods. *See, e.g., Cleveland, supra; Moffit* v. *Bekins Van Lines,* 6 F.3d 305 (5th Cir. 1993); *Hughes* v. *United Van Lines,* 829 F.2d 1407 (7th Cir. 1987). The First Circuit's decision to join these courts in barring state law claims for injuries separate and distinct from the loss of goods creates a virtually insurmountable barrier for claimants who suffer mistreatment at the hands of carriers during the claims process. Given the consistent view of the circuit courts on the scope of Carmack preemption, the issue is likely to be considered resolved by future litigants. Unfortunately, this resolution conflicts very substantially with well-settled constitutional principles governing federal preemption of state law remedies.

With this development, the moving industry is now free to deny the legitimate claims of consumers in the hopes that they will ultimately abandon them; comfortable in the knowledge that if the consumers persist in pressing their claims, they can

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[1] In late 1995, Congress passed legislation abolishing the Interstate Commerce Commission as of January 1, 1996. Act Dec. 29, 1995, P.L. 104-88, 109 Stat. 804. Under the new legislation, the Surface Transportation Board has jurisdiction over carriers of household goods. 49 U.S.C. § 702. The issues presented in the *Rini* case remain vital because the new legislation preserves the Carmack Amendment in the same form as the prior legislation.

only recover under the Carmack Amendment the amount the moving company was bound to pay in the first place. This Court rejected a preemption-based wholesale grant of immunity from state law remedies to another industry just last term in *Medtronic, Inc.* v. *Lohr*, 518 U.S. __, 116 S. Ct. 2240, 2251 (1996). Absent this Court's review and guidance on the scope of Carmack preemption, this serious error of law, and the resulting inequity to the customers of the moving industry, will never be corrected.

A. The First Circuit Decision Contradicts Well-Settled Constitutional Principles Concerning Federal Preemption of State Law

This Court has repeatedly stated, most recently in the last term, that state common law and statutory remedies remain available despite the existence of federal legislation in a related area unless Congress has made its intent to preempt them clear and manifest. *Id.* at 2250. By joining other circuits to preclude recovery on petitioner's state law claims, the First Circuit Court of Appeals has assured that disputes between shippers and carriers of household goods will be decided in a manner that does not give proper deference to the constitutional presumption against preemption. *Id.; Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (holding that "[c]onsideration under the Supremacy Clause [of the United States Constitution] starts with the basic assumption that Congress did not intend to displace state law."); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (ruling that "[t]he historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.").

There is no explicit preemption provision contained in the Carmack Amendment. Instead, a circumscribed preemption of state law can be inferred from the provisions of the statute that fix a carrier's liability for loss or damage to goods to their actual value or the declared value of the shipper. 49 U.S.C.

§§ 11707, 10730(a). Petitioner concedes that these provisions govern the scope of damages for loss or damage to goods in transit.

However, the *Rini* court extends this implicit preemption to bar recovery for all injuries that might be incurred during the course of the shipper-carrier relationship, even when those injuries are separate and distinct from the loss of goods. In the instant case, petitioner incurred damages during the course of a claims process that the trial court found to be egregiously unfair and abusive. Despite this Court's many admonitions that state law is not preempted unless Congress has made its intention to do so absolutely clear, the First Circuit inferred preemption of petitioner's state law remedies for this mistreatment with no meaningful evidence of congressional intent to do so.

B. There Is No Evidence That Congress Intended to Preempt State Law Remedies for Separate Injuries Inflicted by a Carrier in Interstate Commerce

A review of the history, purposes and language of the Carmack Amendment reveals no congressional intent to preempt state law remedies for injuries inflicted by a shipper during the claims process. The Carmack Amendment was enacted in 1906, when conflicting state laws made it difficult to ascertain if, when, and to what extent a carrier was liable for losing or damaging a shipper's goods. *See Pennsylvania Railroad Co.* v. *Hughes*, 191 U.S. 477 (1903). The Carmack Amendment provided a uniform federal rule allowing carriers to contract with shippers to limit their liability and allowing shippers to recover their losses without identifying which of a number of interstate carriers was responsible for the loss. *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913).

By enacting the Carmack Amendment, Congress made its intention clear as to the distribution of the burden of risk for loss or damage to goods between carrier and shipper. *Id.* at

506. However, Congress made no comment whatsoever on whether carriers were subject to state law rules if they unfairly sought to avoid payment of a claim under this rule. There was no legislative history accompanying the Amendment (40 Cong. Rec. 7075 (1906)), so the only glimpse of congressional intent in this regard is contained in the savings clause to the Amendment, re-codified at 49 U.S.C. § 10103. This clause, which states that all remedies provided by the Carmack Amendment are in addition to remedies existing under another law or at common law, can only be fairly read as preserving all remedies not directly in conflict with the terms of the Carmack Amendment. Thus, while the First Circuit recognized that the purpose of the Amendment was an important factor in the preemption analysis, its own examination failed to take into account the specific goals of the legislation at the time it was enacted. Moreover, the court completely disregarded the statute's own language in the savings clause.[2]

The First Circuit also relied on the existence of ICC regulations[3] of the claims process in deciding that petitioner's

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[2] The *Rini* court also purported to rely on *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915), to support its view of Carmack preemption. The relation of this case to the present dispute is obscure. *Varnville* involved a South Carolina statute that imposed on all carriers the burden of identifying which carrier had lost or damaged a shipper's goods within forty days, or to pay the claim itself. If a carrier failed to either identify the responsible carrier or pay the claim within forty days, the statute imposed a penalty of $50.00. The Court in a somewhat confusing opinion found that this statute was preempted by the Carmack Amendment. *Id.* at 604. Petitioner argues that the fatal defect of this statute was that it clashed directly with the terms of the Carmack Amendment which places responsibility for the shipment squarely on the initial carrier. *Rini*, on the other hand, more resembles *Missouri, Kansas & Texas Railway Company of Texas* v. *Harris*, 234 U.S. 412 (1914), wherein the Court found that the award of attorneys' fees to a shipper mistreated by an intransigent carrier was not precluded because Congress did not speak directly on the issue of attorneys' fees and because the award did not conflict with the purposes of the Carmack Amendment.

[3] These regulations govern procedural aspects of making and deciding a claim, but provide no remedy to a shipper when the carrier violates the regulations. 49 C.F.R. §§ 1005.2-1005.5

state law claims were preempted. A. 7 However, again the court's reasoning conflicted with well-settled principles of preemption. This Court has held that the existence of even extensive regulations, standing alone, cannot be interpreted as an intent to preempt state law remedies. *English* v. *General Elec. Co.*, 496 U.S. 72, 87 (1990). When such regulations exist, an important source of information regarding their preemptive effect is the regulating agency itself. *California Coastal Comm'n* v. *Granite Rock*, 480 U.S. 572, 583 (1987). Since an agency can reveal its intentions in a wide variety of ways, it can be expected to directly communicate its view of the preemptive effects of its own regulations. *Id.* The ICC made no comment on the issue of preemption when promulgating regulations involving the claims process. 37 Fed. Reg. 4257 (1972). Consequently, there is no evidence that the ICC itself believed its regulations should preclude state court remedies for abuses by carriers during the claims process.

Thus, with no explicit guidance either from Congress or from the agency regulating interstate carriers, the First Circuit nonetheless inferred an intent to supplant state law. This ruling, along with the rulings of the other circuits, violates settled principles of federalism which prohibit inferences of congressional intent under these circumstances.

In passing, Petitioner notes that although the *Rini* court assumed federal jurisdiction over all possible claims by shippers against carriers and thus a strong federal interest, the federal government has never entered into a Carmack preemption case on either side to express its opinion of its own role. The government's opinion of the preemptive effect of the Carmack Amendment is an important factor that has never been weighed by the courts of appeal and which this Court could invite.

C. The View of Carmack Preemption Taken by the First Circuit in This Case Effectively Grants Immunity to an Entire Industry in the Absence of Any Congressional Intent to do so

The view of Carmack preemption taken by the *Rini* court is especially troubling because only limited remedies are available to shippers via the Carmack Amendment. For instance, in this case, a jury determined that United lost petitioner's artwork and valued it at $50,000.00. However, throughout the five year period encompassing the claims process and the ensuing litigation, United denied losing petitioner's possessions and never offered her a dime in compensation for the loss. The trial court described United's conduct over this period as "belligerent and intimidating," (A. 15) and "in bad faith." A. 21 Despite the manifest unfairness of its treatment, United will suffer no consequence for its behavior. Under the First Circuit's ruling United will have to pay petitioner only what it owed her on the day she filed her claim.

This Court has not countenanced such wholesale grants of immunity from state law remedies in the absence of unambiguous congressional intent. *Medtronic, Inc.*, 116 S. Ct. at 2251; *Silkwood* v. *Kerr McGee Corp.*, 464 U.S. 238, 251 (1984) (commenting that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). There is no evidence, much less unambiguous evidence, that Congress intended to remove state law remedies for injuries separate and distinct from the loss of goods when it enacted the Carmack Amendment. Ironically, the implicit preemption provision contained in the Carmack Amendment has been given a far more sweeping effect by the courts of appeal than the explicit preemption provisions of other federal statutes, where this Court has made clear that the intent of Congress must be carefully parsed to assure that state law is not wrongly supplanted. *Medtronic, Inc., supra; Cippollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992).

D. The Supreme Court Should Decide This Issue Because It Is of Great Importance and the Current Interpretation of the Carmack Amendment Is Inconsistent with the United States Constitution

Congress' failure to address in the Carmack Amendment unfair claims practices in the moving industry is not surprising since it was enacted long before the advent of laws passed to afford protection to consumers from the unscrupulous acts of businesses. Because of this omission, the moving industry has been able to exempt itself from the requirements of good faith and fair dealing with its customers, by asserting immunity from state law claims based on implicit preemption by the Carmack Amendment. This Court should grant certiorari in this case, not to resolve a conflict between the circuits courts of appeal; but rather to correct the continued misapplication by the circuit courts of appeal of the law of preemption as it applies to the Carmack Amendment. While petitioner recognizes this Court cannot correct every error of law that occurs in the courts below, she submits that the particular error addressed in this petition presents a compelling case for Supreme Court review. First, the error is one of constitutional magnitude and involves important principles of federalism. Next, the error involves one of the nation's largest industries and consumers in every corner of the United States, and continued misapplication of the law of preemption will have a far-reaching impact. Finally, because the First Circuit opinion echoes the decisions of other courts of appeals, Supreme Court review is the only means of correcting the error in this important arena.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 95-2334

JANE RINI,
PLAINTIFF - APPELLEE,
v.
UNITED VAN LINES, INC.,
DEFENDANT - APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. MICHAEL A. PONSOR, *U.S. District Judge*]

Before
TORRUELLA, *Chief Judge*,
COFFIN and CAMPBELL, *Circuit Judges*.

Daniel J. Gleason, with whom *Terry L. Wood*, *Nutter, McClennen & Fish, LLP*, *Wesley S. Chused*, *Lisa Sternschuss* and *Looney & Grossman* were on brief for appellant.

George W. Wright, *Michael J. Rush* and *Kenneth E. Siegel* on brief for American Movers Conference, Association of American Railroads and American Trucking Associations, amicus curiae.

John P. Pucci, with whom *Jeanne M. Kaiser* and *Fierst, Mitchell & Pucci* were on brief for appellee.

JANUARY 17, 1997

TORRUELLA, *Chief Judge*. Plaintiff-appellee Jane Rini ("Rini") hired defendant-appellant United Van Lines ("United") to move her belongings from South Carolina to Massachusetts. Rini's household items were packed on August 20, 1990, and loaded into a moving van the next day. Her belongings arrived at their destination on August 27, but cer-

tain items were missing. Rini proceeded to file a claim with United. Following an acrimonious attempt to settle the claim, Rini filed a complaint in district court on December 22, 1992. The complaint included claims under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707 (1992),[1] as well as state law claims of negligence, misrepresentation, use of unfair and deceptive acts in violation of Mass. Gen.L. ch. 93A, and intentional infliction of emotional distress. *See Rini* v. *United Van Lines*, 903 F. Supp. 224, 225 (1995).

The jury found for Rini on the Carmack Amendment, negligence, and misrepresentation claims in connection with the claims process. *See Rini*, 903 F. Supp. at 230. On the claim of intentional infliction of emotional distress, the jury found for United. *Id.* The district court found that United, in handling Rini's claim, had willfully violated chapter 93A. *Id.* at 232-33. Damages were awarded in the amount of $50,000 on the Carmack claim and a total of $300,000 on the state law claims. *Id.* 234-35. In addition, Rini was awarded attorney's fees in the amount of $146,950, costs in the amount of $7,359.60, and prejudgment interest in the amount of $100,000. *See* Memorandum Regarding Plaintiff's Motion for Attorney's Fees, Costs, and Pre-Judgment Interest, Nov. 1, 1995. This appeal by United ensued.

We must determine whether the state law claims on which Rini prevailed are preempted by the Carmack Amendment. These claims are for negligence, misrepresentation, and violation of Mass. Gen. L. ch. 93A.

I. Preemption and the Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707, passed in 1906 as part of the Hepburn Act, ch. 5391, 34 Stat. 584, governs the liability of carriers for lost or damaged goods. The relevant portions of the Amendment are:

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[1] There have been amendments to the Carmack Amendment since 1990 when the events at issue in this case took place. Throughout this opinion, references will be made to the pre-amendment statute.

> A common carrier . . . subject to the jurisdiction of the Interstate Commerce Commission. . . shall issue a receipt or a bill of lading for property it receives for transportation. . . . That carrier . . . and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose lines or route the property is transported into the United States . . . .

49 U.S.C. § 11707.

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land," notwithstanding contrary state laws. U.S.Const. art. VI, § 2. It is settled, therefore, "that all conflicting state provisions be without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). When faced with a preemption question, however, consideration "starts with the assumption that the historic powers of the States [are] not to be superseded by . . . Federal Acts unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

> Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws in the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Id. Finally, a state statute is void to the extent it is in conflict with a federal statute. *Maryland*, 451 U.S. at 747.

In determining the scope of Carmack preemption, we look to the intent of Congress and the purpose of the Amendment. Our inquiry into the intent of Congress is made more difficult because the Carmack Amendment was adopted without discussion or debate. 40 Cong.Rec. 7075 (1906). It is accepted, however, that the principal purpose of the Amendment was to achieve national uniformity in the liability assigned to carriers. "[I]t is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506 (1912). The importance of uniformity has frequently been stressed in subsequent Supreme Court opinions. *See, e.g., New York, N.H. & Hartford R.R. Co.* v. *Nothnagle*, 346 U.S.128, 131 (1953); *Atchison, Topeka & Santa Fe Ry.* v. *Harold*, 241 U.S. 371, 378 (1916).

The foundation for Carmack preemption analysis is *Adams Express*, in which the Supreme Court considered the preemptive scope of the Carmack Amendment, concluding:

> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it.

Adams Express, 226 U.S. at 505-06. The Court stated further that to allow state regulations to affect the liability of carriers "would be to revert to the uncertainties and diversities of rulings which led to the amendment." *Id.* at 506.

The preemptive effect of the Carmack Amendment over state law governing damages for the loss or damage of goods has been reiterated by the Supreme Court in many cases and is well established. *See, e.g., Southeastern Express Co.* v.

Pastime Amusement Co., 299 U.S.28 (1936) (claim of negligence for failure to deliver a film on time is preempted); *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915) (state statute imposing a penalty for failure to pay claims to a shipper within 40 days is preempted).

Unfortunately, the Supreme Court case law does not provide clear guidance on the reach of the preemption doctrine. In particular, the Court has not clarified the extent to which state law provisions pertaining to the claims process, as opposed to the shipping of goods, are preempted. Two cases, however, are instructive. First, in *Missouri, Kansas, & Texas Railway Company of Texas* v. *Harris*, 234 U.S. 412 (1914), the Court considered a Texas statute that allowed for the recovery of reasonable attorney's fees in cases where the value of the claims did not exceed two hundred dollars. The Court held that because the state statute at issue "had a broad sweep which only incidentally includes claims rising out of interstate commerce, it follows that it cannot be held to constitute a direct burden upon such commerce." *Id.* at 416. For this reason, the statute was ruled to be valid and able to exist alongside the Carmack Amendment. The important distinction made by the Court was that "the Texas statute . . . does not anywhere either enlarge or limit the responsibility of the carrier for the loss of property intrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility." *Id.* at 420. Furthermore, "[t]he local statute . . . does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken." *Id.* at 421-22.

Second, in *Varnville*, the Court ruled that a South Carolina statute that imposed a fine of $50 on carriers for failure to pay within 40 days for damage to goods transported in interstate commerce was preempted by the Carmack Amendment. *Varnville*, 237 U.S. at 603. The Court determined that the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate

shipments, and the contracts of carriers with respect thereto, have been superseded." *Id.* at 603. The state statute before the Court was found to "overlap[] the Federal act in respect of the subjects, the grounds, and the extent of liability for loss." *Id.*

These two cases are of particular relevance to the instant case because the state laws at issue did not govern claims arising directly out of damage to goods. Like the instant case, both *Harris* and *Varnville* consider state remedies that relate to the claims process. The distinction between the two cases was made in *Varnville*, where the Court stated that:

> [i]t is true that in [*Harris*] the inclusion of the attorney's fee, not exceeding $20, in the costs upon judgments for certain small claims was upheld, although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental, the ground relied upon was that the statute did not 'in any way enlarge the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the measure of recovery.' The South Carolina Act, on the other hand, extends the liability to losses on other roads in other jurisdictions, and increases it by a fine difficult to escape.

Id. at 603 (citations omitted).

The lesson from these cases is that state statutes are preempted by the Carmack Amendment if they "in any way enlarge the responsibility of the carrier for loss or at all affect the ground of recovery, or the measure of recovery." *Id.*

The Carmack Amendment and the set of federal regulations that complement it cover not only the actual transport of goods, but they also govern the claims process. For example, the Amendment itself provides that a carrier "may not provide . . . a period of less than 9 months for filing a claim . . . and

a period of less than 2 years for bringing a civil action against it under this section." 49 U.S.C. § 11707(e).[2]

In light of the Court's holding in *Varnville*, we find that all state laws that impose liability on carriers *based on the loss or damage of shipped goods* are preempted. A state law "enlarges the responsibility of the carrier for loss or at all affects the ground of recovery, or the measure of recovery," *id.* at 603, where, in the absence of an injury separate and apart from the loss or damage of goods, it increases the liability of the carrier. Preempted state law claims, therefore, include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims. Thus, the forty day limit for payment at issue in *Varnville* is preempted. On the other hand, liability arising from separate harms — apart from the loss or damage of goods — is not preempted. For example, if an employee of the carrier assaulted and injured the shipper, state law remedies would not be preempted. Similarly, a claim for intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted.[3]

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[2] *See also* 49 C.F.R. §§ 1005.2-1005.5. These federal regulations govern the filing of claims, § 1005.2, acknowledgment of claims, § 1005.3, investigation of claims, § 1005.4, and disposition of claims, § 1005.5. Failure to comply with these federal regulations subjects the carier to sanctions. *See Zola* v. *I.C.C.*, 889 F.2d 508, 509 (3d Cir. 1989); *Aaacon Auto Transp., Inc.* v. *I.C.C.*, 792 F.2d 1156, 1158 (D.C. Cir. 1986). Although "the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies," *English* v. *General Elec. Co.*, 496 U.S. 72, 87 (1990), the above federal regulations indicate that the claims process is within the scope of the shipper-carrier relationship that the federal government seeks to regulate.

[3] We are aware that our holding today conflicts with certain previous decisions of the District Court of Massachusetts. In particular, we note that the cases of *Sokhos* v. *Mayflower Transit Inc.*, 691 F. Supp. 1578 (D. Mass 1988), and *Mesta* v. *Allied Van Lines*, 695 F. Supp. 63 (D. Mass. 1988), allowed certain claims that would be preempted under the decision that we lay down today. To the extent these decisions are inconsistent with our holding, they do not represent the law of the circuit. We are also aware that our own decision in *Fredette* v. *Allied Van Lines*, 66 F.3d 369 (1st Cir.

II. Application

In the instant appeal, the state law claims at issue all stem from the loss of goods. The alleged negligence and misrepresentation took place in the course of settling a claim for damages stemming from the move. Rini suffered no harm other than the loss of goods and, therefore, her state law claims are preempted by the Carmack Amendment. Had Rini prevailed on her claim for intentional infliction of emotional distress, it would not have been preempted. Because the three state claims at issue in this appeal involve no injury save the loss of property, however, we find them to be preempted.

Our conclusion is consistent with the view taken by the Second Circuit in *Cleveland* v. *Beltman North American Company*, 30 F.3d 373 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 901 (1995). In that case, the court described the plaintiffs' allegations as follows:

> In handling plaintiffs claims', the moving company — in a deliberate and determined effort to frustrate plaintiffs' collection of damages for their losses — was guilty of foot-dragging and stonewalling. It did not deal fairly and in good faith with the couple.

Id. at 374. The claim addressed by the court was a federal common law claim for breach of an implied covenant of good faith and fair dealing in the claims process, damages from which "were to be exclusive of damages awarded for actual loss under the bill of lading." *Id.* at 76. The Second Circuit held that there could be no federal common law claim for a breach of the implied covenant of good faith and fair dealing. *Id.* at 379. In so deciding, the court concluded that "[a] claim for breach of the implied covenant of good faith and fair dealing resulting in an award of punitive damages could well thwart one of the primary purposes of the Carmack Amendment; that is, to provide some uniformity in the disposition

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1995), involved both Carmack Amendment and state law claims. *Id.* at 372. That case did not, however, address the preemption issue and, therefore, offers us no guidance.

of claims brought under a bill of lading." *Id.* Although *Cleveland* dealt with an issue of federal common law, the same reasoning implies that state law remedies for loss or damage to goods would be preempted.

The instant case presents the same question as did *Cleveland*. We face a plaintiff who has been ill-treated in her attempts to settle her claim with United. As a result of United's unfair practices, the jury found for Rini on the negligence and misrepresentation counts and the trial judge found for Rini on the use of unfair and deceptive acts count. Like our sister circuit before us, we note that although "[i]t may be that Congress' enforcement scheme does not provide a sufficient deterrent to the type of conduct defendants employed in this case," *id.* at 379, we find that the federal scheme has preempted negligence, misrepresentation, and chapter 93A claims.

Finally, we note that our ruling preserves the uniformity of the federal scheme by protecting the federal government's exclusive jurisdiction over the shipper-carrier relationship, the importance of which has been underscored on numerous occasions.[4] "The purpose of [the Carmack Amendment] is to establish uniform federal guidelines designed in part to remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment."*Hughes* v. *United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987); *see also Cleveland*, 30 F.3d at 379 (stating that one of the primary purposes of the Carmack Amendment is to provide uniformity in the disposition of claims brought under a bill of lading). Because the Carmack Amendment was intended to provide uniformity to claims for the loss or damage to goods, the goal of uniformity is not frustrated by the allowance of state law claims for injuries that are separate and distinct from such loss or damage.

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[4] *See supra* pp. 4-5.

III. Conclusion

For the foregoing reasons, the conclusion of the district court regarding the preemptive effect of the Carmack Amendment is reversed. In light of our ruling, the district court's judgment as to costs, fees and prejudgment interest must be revisited. The case is *remanded* to the district court for the entry of an order with respect to damages and a ruling on fees, costs, and interest consistent with this decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 92-30260-MAP

JANE RINI,
PLAINTIFF,
v.
UNITED VAN LINES, INC.,
DEFENDANT.

ORDER

November 1, 1995

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, the clerk is ordered to enter judgment against United in the sum of $350,000.

s/ MICHAEL A. PONSOR
MICHAEL A. PONSOR
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 92-30260-MAP

JANE RINI,
PLAINTIFF,
v.
UNITED VAN LINES, INC.,
DEFENDANT.

MEMORANDUM REGARDING PLAINTIFF'S 93A CLAIM

NOVEMBER 1, 1995

PONSOR, D.J.

I. INTRODUCTION

Plaintiff Jane Rini ("Rini") brought this action against defendant United Van Lines, Inc. ("United") alleging, first, that United employees lost or stole valuable art work belonging to her during transport from South Carolina to Massachusetts, and, second, that United compounded the offense by subjecting her to a negligent and fraudulent claims process when she attempted to get compensation for the lost articles. Specifically, in her complaint Rini has averred that United was negligent, violated the Interstate Commerce Act, made misrepresentations, used unfair and deceptive acts in violation of Mass. Gen. L. ch. 93A, and caused her emotional distress. After an eight day trial, the jury returned a verdict for the plaintiff, awarding $50,000.00 in compensatory damages on the claim under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707, for the loss of the goods, and $100,000.00 in damages for United's negligence and misrepresentation during the subsequent claims process.

Before the court is plaintiff's non-jury claim for multiple damages and attorneys' fees under Mass. Gen. L. ch. 93A and for attorneys' fees under the Carmack Amendment. Based on the testimony at trial and the extensive written submissions that followed, the court will enter judgment against United for engaging in unfair and deceptive trade practices prohibited under 93A. As will be seen, the extreme egregiousness of United's conduct during the claims process warrants the rare sanction of an award of treble damages. In accordance with the provisions of 93A and the Carmack Amendment, the court also will award reasonable attorneys' fees, costs and interest.[1]

II. FINDINGS OF FACT

A. *Pre-Transportation of Goods*

In the summer of 1990, Jane Rini was living with her three children in Myrtle Beach, South Carolina. During that summer, she decided to move with her children from Myrtle Beach to Northampton, Massachusetts, where she planned to attend Smith College under the Ada Comstock program for mature students.

On August 10, 1994, Rini contacted Nilson Van Lines, Inc. ("Nilson"), United's South Carolina agent, and requested an estimate for the cost of her move to Northampton. On August 14, 1990, Nilson's sales-agent, Hilda Holston ("Holston"), came to Rini's house to give an estimate of her move. Rini gave Holston a tour of her home and identified the art work and other belongings that needed to be moved. Rini advised Holston of the substantial market value of the pieces of art and their significance as family heirlooms. Based on Holston's estimate and representations, Rini ultimately chose United to move her household belongings. Resolving a disputed issue at trial, the court specifically finds that Holston failed to give plaintiff a copy of the ICC's OCP-100 booklet entitled "Your

[1] The issue of attorneys' fees, costs and interest will be addressed in a separate Memorandum and Order.

Rights and Responsibilities When You Move," a document the ICC requires to be given all shipping customers. This omission will have significance in the discussion below.

Nilson packers William Tonsor ("Tonsor") and Earl Herrington ("Herrington") arrived at Rini's house to pack her household items on August 20, 1990. Herrington personally wrapped the pieces of art work in packing paper and placed them into boxes. On the outside of each box, Herrington wrote a general description of the nature and condition of the art work. Among the art work Herrington and Tonsor packed were the following eleven pieces that form the basis for Rini's claim against United: one pair of Chippendale mirrors; one Mezzotint of the Virgin Mary; one Ivory crucifix; three silk embroideries on paper, *St. Jerome, Jesus* and *St. John;* and four small paintings, *Soldiers Gaming, Boy Smoking, Landscape* and *Shoemaker or Boy Sewing* (collectively referred to as "the missing art work"). Tonsor then created an inventory of all the items going to Northampton, specifically noting the boxes that contained the art work.

On August 21, 1990, Nilson van driver T. C. Jenkins ("Jenkins") and two loaders placed all the boxes designated for Northampton in his van, including those containing the art work, and departed Rini's Myrtle Beach house. Jenkins had the responsibility to deliver all of Rini's goods, including the packed art work, to plaintiffs' new home in Northampton, Massachusetts.

B. *Transportation and Unloading of Rini's Goods*

Jenkins drove to Columbia, South Carolina, where the van was parked for two days in a storage facility. On August 24, 1990, Jenkins took the van from the storage facility to another location in Columbia, South Carolina, where he loaded another party's household goods into the van with Rini's belongings. Jenkins then drove both loads to Massachusetts. He arrived at Rini's house on August 27, 1990, positioned his van outside Rini's house, opened the double doors in the center of the van and proceeded to unload over a six- to eight- hour period.

During the unloading process, Jenkins became ill and slept in his van for sometime, leaving others to unload without his supervision. Also during this time Jenkins vomited in one of plaintiff's bathrooms, leaving Rini and her daughters to clean up the mess when it was discovered the next day. While Jenkins slept, the van doors remained open and his co-workers continued to unload boxes from the van.

At the conclusion of the unloading process, Rini discovered that some of the boxes containing her art work appeared to be missing and immediately advised Jenkins. Jenkins attempted to locate all the boxes identified on United's inventory sheets but was unable to do so. For instance, Jenkins could not locate Orange Box #77 which, according to United's inventory, had been packed by United's packers and contained several pieces of Rini's missing artwork.

At the end of a long day, Jenkins demanded that Rini sign the inventory sheets before she opened any boxes, despite both the unresolved questions regarding the missing items and Rini's request first to inspect the boxes. Jenkins insisted that the apparently missing boxes must be somewhere in the stacks and piles in Rini's house; he refused to search for them and refused to leave plaintiff's house until she signed for the delivery. His only assistance was to permit Rini to inspect his now half empty van to confirm that, at least, none of her belongings remained there.

Having observed the witnesses and heard the testimony, this court finds that Jenkins was deliberately belligerent and intimidating in his manner towards plaintiff. Because of this, and being exhausted from the day's work, Rini signed United's inventories. She did, however, indicate on these papers that boxes were missing. Jenkins did not advise Rini to make any additional notations on the inventory sheets. Rini also signed, under pressure from Jenkins, the Delivery Acknowledgement Box on United's Bill of Lading. The incomplete inventory sheets were incorporated by reference into that Bill of Lading. Rini was not advised that she should make notations on the

Bill of Lading concerning United's apparent failure to deliver some of her household goods.

On August 28, 1990, Jenkins proceeded to Wellesley, Massachusetts, where he dropped off the second half of his load. On that same day, Rini and her family opened the boxes United had delivered and positively determined that the eleven pieces of artwork were missing.

C. *The Claims Process*

Rini filed a claim for her missing art work on October 2, 1990. From that day forward, this court finds, defendant and its employees deliberately engaged in a pattern of unfair and deceptive practices in an effort to compel plaintiff to abandon a claim that they knew, or should have known, was valid. In fact, as the testimony well demonstrated, and as the jury found, painful as the loss of the art work was, that injury paled in comparison to the abuse meted out by United in the claims process.

In the claim submitted to United, Rini identified the missing art work in detail. Although she had never had these family heirlooms appraised, she estimated their value at $134,000.00. On October 12, 1990, Rini provided United with slides of ten of the eleven missing pieces.[2]

Rini's claim was assigned to United Claims Adjuster, Eric Hartman ("Hartman"), who worked at United's worldwide headquarters in Fenton, Missouri. On October 31, 1990, Hartman first informed Rini that he was investigating her claim. By letter dated November 1, 1990 he assured Rini that he would be conducting a "thorough investigation" of her claim. He also requested that Rini substantiate the value of her art work by presenting canceled checks, credit card receipts, recent appraisals, insurance riders, cash receipts or similar paperwork. In response to that letter, Rini informed Hartman that no such documentation existed beyond the photos already sent, and a family letter dated from 1929, which reflected the authenticity of some of the art work.

[2] Rini advised United that she did not have slides of the Mezzotint.

This is perhaps a good point to comment on United's persistent demand for documentary substantiation of the value of the lost goods. Perhaps some families do carefully maintain old receipts for family heirlooms, or have these cherished articles appraised regularly for insurance purposes. Many families, however — probably most — do not do this. It is unreasonable to expect all families to manage their affairs with such meticulousness, and it is unfair of United to deny compensation to families that cannot provide this kind of pre-loss documentation. The unfairness for Rini and her family, of course, went much further. As will be seen, plaintiff eventually paid to obtain professional appraisals of her art work, based upon excellent photographs of the works, and supplied these to United. Defendant's reply to this effort was a magnificent Catch-22: they would not accept appraisals unless they were based upon *actual examination* of the physical objects. Given that plaintiff was asserting a claim for items lost or stolen by United's employees, the objects were by definition unavailable to be examined leaving defendant *ipso facto* off the hook, at least by its logic.

Defendant maintained this ludicrous position throughout trial despite the testimony of *its own* trial expert that fair and reliable estimates of value are commonly obtained through examination of photographs such as those supplied by plaintiff. United's continual demands for non-existent pre-loss documentation, knowing that such papers did not exist, was a flat sham to justify denial of a valid claim. Its refusal to consider reasonable alternate methods for determining the value of the lost items was clear proof of its bad faith. Moreover, if United were going to insist on such a policy, it had an obligation to *inform* its customers of it, so they could consider obtaining appraisals before subjecting valuable unappraised belongings to risk of loss in transport.

Meanwhile, despite Hartman's promise, and his obligation, to conduct a thorough investigation of Rini's claim, he did no such thing. He failed to interview Holston in a timely fashion, failed to obtain a written statement from Jenkins, and failed

even to contact the loaders in Myrtle Beach. In addition, he failed to investigate whether any of Rini's missing art work had been mistakenly unloaded at one of the locations Jenkins' van stopped at before Northampton, failed to contact the unloaders in Northampton and failed to inquire as to whether any of Rini's missing art work had been mistakenly unloaded in Wellesley, Massachusetts.

These were not mere errors of form. At trial, for example, Herrington (one of the loaders in Myrtle Beach) testified that although he recalled packing the art work, he had no clear recollection of the specific nature of that art work. He stated that he might well have been able to recall Rini's art work more clearly if United had interviewed him in the fall of 1990, but such an interview was never attempted. In sum, Hartman intentionally misrepresented that he was conducting a thorough investigation, when in fact he was doing next to nothing. His primary goal was to set up Rini's claim for rejection by making demands for documentation that, he was repeatedly told, did not exist.

This intent was clearly documented during a meeting on January 14, 1991, a few months after plaintiff made her claim. The meeting was attended by Hartman with United's in-house lawyers and management to discuss Rini's claim. At this time, all parties agree, the investigation of the claim was at an early stage. No objective basis existed to deny or allow the claim. Nevertheless, after this meeting, Hartman wrote a note to himself regarding the Rini claim: "Maintain denial after talking to packers." In fact, as it turned out, he maintained denial *without* talking to the packers or anyone else. The notation demonstrates United's willful intent to deny Rini's claim regardless of its legitimacy.

Hartman formally declined Rini's claim *in toto* on July 8, 1991, on the following three grounds: (1) all items given by Rini to United were delivered and signed for on the Bill of Lading without a notation indicating missing items; (2) United had not received documentation to substantiate Rini's claim for $134,000.00; and (3) United's investigation had not

uncovered any evidence that Rini's goods were not delivered to Northampton. All three of these reasons are specious.

First, defendant's own inventory sheets would have confirmed, had Hartman examined them, that all plaintiff's property was not received. A discussion with Jenkins would have provided United evidence to show that he was ill and inattentive at the unloading and that plaintiff was intimidated into signing for her possessions before Jenkins or Rini had been able to confirm that they were all safely in the house.

Second, Rini made exhaustive attempts to substantiate the value of the missing artwork. She attempted to locate her grandfather's will and appraisal records, she searched her grandfather's law firm for records, and she also looked through the New York Bureau of Records. Rini then hired, at her own expense, two experienced art appraisers, Lewis Sheppard ("Sheppard") and William Hubbard ("Hubbard") to appraise her art work from the same slides that she had provided to Hartman.[3] Sheppard appraised three of Rini's missing paintings at a total value of $10,000.00. Hubbard appraised the three missing embroideries at a value of $45,000.00.

Rini submitted the Sheppard and Hubbard appraisals to Hartman. Hartman did not investigate the credentials of Sheppard or Hubbard, nor did he submit their appraisals to United appraisers for evaluation. Instead, relying on United's purported policy not to accept appraisals based upon anything other than direct physical examination, and United's arbitrary position that (despite their own records) all items had been delivered to Northampton, Hartman flatly refused even to consider the Sheppard and Hubbard appraisals. While it is true that plaintiff's experts' appraisals did not add up to $134,000, they were evidence of substantial loss. Despite them, defendant never offered plaintiff a dime.

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[3] Sheppard was trained as an appraiser at Sotheby's in New York city, had been curator of Amherst Colleges Meade Museum of Art for a number of years and had been an appraiser for more than twenty years. Hubbard was a Harvard-educated appraiser with more than thirty years experience.

Defendant's third argument — that no evidence suggested that the goods were not properly delivered — is simply absurd. Plaintiff and her daughters credibly reported on the missing pieces, and defendant's own documents substantially corroborated them. An adequate investigation, rather than a whitewash, would have disclosed the sloppiness of United's employees and lent further support to plaintiff's claim.

As noted above, Rini never received the ICC's OCP-100 booklet entitled "Your Rights and Responsibilities When You Move," which detailed United's supposed arbitration program. It was not until December 12, 1991, six months after her claim was formally denied, that United first advised Rini of the availability of an arbitration program. Under the terms set forth in the descriptive brochure, invocation of United's arbitration program required Rini to give up any opportunity to present witnesses on her own behalf, and to waive various categories of damages, including consequential damages. Understandably, Rini declined to go this route.[4]

Rini properly served a 93A demand letter on United, detailing United's loss of her art work and her experience with United's claims process, on October 8, 1992. On November 11, 1992, United sent Rini's counsel a letter denying Rini's claim completely without any offer of settlement. In its response, United maintained its position that (a) Rini had signed for her entire shipment without exception and (b) there was no evidence that United had failed to deliver the missing art work. United also took the position that the 93A and common law claims were preempted by the Carmack Amendment. This letter compounded the unfair and deceptive trade practices United engaged in during the claims process. Despite the lack of any even minimal investigation and despite the inventory sheets, which themselves confirmed that at least one

[4] United never itself agreed to, or even explicitly proposed, arbitration. It only informed plaintiff of the existence of the program. Given United's decision to "maintain denial" in January 1991, it is hard to imagine United itself agreeing to arbitrate at all or, if it did agree, participating in good faith.

box of art work was missing at the time of delivery, United persisted in asserting that Rini had received everything. Other, rather gratuitous rationalizations were layered over these arguments. For example, the letter falsely states "We are informed . . . the cartons were stored in an unsecured dormitory building with access prior to being unpacked." This unfounded remark can only be viewed as a deliberate concoction designed to add strength to United's bad faith denial of Rini's claim.

The day after rejecting plaintiff's 93A letter, November 12, 1992, United filed a Declaratory Judgment Action in the United States District Court in South Carolina against Rini, seeking to forestall any legal action by her to obtain redress for loss of her goods and for United's misconduct during the claims process. United contended that it was entitled to judgment in this action because it had conducted a "thorough investigation" of Rini's claim as required by law. *See* 49 C.F.R. § 1005.4 (1992). Rini was compelled to retain counsel to contest the suit, and on February 26, 1993, the South Carolina District Court dismissed United's complaint, ruling that it was not a proper use of the Declaratory Judgment Act.

As plaintiff and her witnesses testified, and as the jury obviously found, United's scorched earth policy in handling this claim caused Rini terrible emotional pain — anguish above and beyond the mere loss of goods covered by the Carmack Amendment. She suffered hypertension and high blood pressure; her sleep pattern was interrupted; she lost interest in her academic work. She attended mental health counselling once a week and was eventually diagnosed as suffering from a major depressive episode, requiring medication. As her therapist testified, this suffering stemmed not only from the loss of her family heirlooms, but from the treatment she received from United in the subsequent claims process.

Plaintiff filed her complaint in this court on December 22, 1992. Defendant responded with a motion to dismiss, on the ground of preemption, all causes of action, except the count asserted under the Carmack Amendment, and with a motion

to transfer that count to South Carolina. The motion to dismiss was allowed in part by Judge Freedman, with regard to any non-Carmack claims seeking damages for loss of the goods in transport, and was otherwise denied.

The defendant persisted with the preemption argument by filing a motion for summary judgment at the close of discovery and by objecting repeatedly during the trial to any evidence supporting claims for damage on any basis except the Carmack Amendment. The defendant maintained this position despite the fact that the court agreed that the Carmack Amendment provides the exclusive avenue for recovery of damages based on the loss of the goods. In the ruling on defendant's motion for summary judgment at the close of discovery, common law causes of action were permitted *only* to the extent that they were anchored on allegations of damage independent of any loss of the goods.

D. *Trial*

At trial, the court tightened the limitation on the non-Carmack causes of action further. Over plaintiff's objection the court refused to send to the jury any claims under the common law relating to actions by United or its employees occurring *before* plaintiff's property was loaded onto United's van in Myrtle Beach. The alleged misrepresentations by United employees prior to loading, the court found, were too intertwined with the delivery process itself to avoid the Carmack Amendment's preemptive sweep. The jury was permitted to consider the common law counts only as regards the claims process after the delivery of the goods and only as regards injury unrelated to the loss of the goods *per se*. The claims process, the court found, was entirely independent of the transport of the goods and involved damages clearly separate from those generated by their loss.

The distinction drawn by this court is explicitly supported by decisional law from this district. *Urban Elec. Co. Inc.* v. *Cable Index*, 735 F. Supp. 29, 32 (D.Mass. 1990); *Mesta* v. *Allied Van Lines Intern. Inc.*, 695 F. Supp. 63, 65 (D. Mass.1988); *Sokho* v. *Mayflower Transit, Inc.*, 691 F. Supp. 1578, 1581 (D. Mass. 1988).

More importantly, the First Circuit Court of Appeals has recently accepted, by implication, the same distinction between Carmack-preempted and independent claims. *See Fredette* v. *Allied Van Lines, Inc.*, 66 F.3d 369 (1st Cir. 1995). In *Fredette* the First Circuit affirmed a jury award of $18,500 under the Carmack Amendment for loss of goods, and of $7,500 for breach of contract and $10,000 for intentional infliction of emotional distress. Although the common law claims in *Fredette* were much more closely entwined with the Carmack claim than Rini's claims are here, Judge Boudin's opinion makes no reference to any potential preemption of these common law claims.

Testimony in this case began on December 5, 1994 and concluded on December 14, 1994. At trial, United maintained the same conflicting and often fatuous defenses. First, United suggested that Rini never gave the art work to United, because she either mistakenly or intentionally left it behind at her Myrtle Beach home. Second, United asserted that even if Rini had given the art work to United, United's employees had delivered it to her in Northampton. Third, even if United had failed to deliver the art work to Northampton, she could not prove it had any value because she only had photographs of the art work at issue and appraisals based on those photographs. Fourth, even if the missing art work could be appraised from photographs, Rini's appraisals were inflated.

The defense strategy seemed to be to offer any argument theoretically available, regardless of its basis in fact. United's own employees testified to seeing and packing the art work. Jenkins, the transporter, testified that he could not locate all the boxes United was supposed to deliver to Rini's house in Northampton. Both Rini and Jenkins testified at trial that all the boxes were delivered to Rini at a secure residence, and not an unsecured dormitory. Moreover, despite United's attempt aggressively to challenge Rini's credibility, her testimony emerged as trustworthy and consistent.

In the early stages of the trial, United's counsel and United's employees vehemently asserted that appraisals through photo-

graphs were unacceptable. Yet later at trial, as noted above, United's own witness testified to the contrary. Karen Keane testified that her gallery routinely made "practical business decisions" concerning the value of art work from photographs of the art work alone. Nancy Smith also testified that she was able to appraise art work from photographs and slides. Smith then testified to specific appraisals for certain pieces of Rini's missing art work.

In response to special interrogatories, the jury found United liable for loss of plaintiff's art work under the Carmack Amendment and awarded Rini $50,000.00 in compensatory damages. The jury declined to award plaintiff any damages for emotional distress based on the loss of her goods. The jury also found that United was negligent in conducting its claims process and that United made intentional misrepresentations during that claims process. Significantly, the jury specifically found that this negligence and intentional misrepresentation was a proximate cause of injury to the plaintiff *other than* injury arising from the loss of her goods. On these two claims the jury therefore awarded Rini a total of $100,000.00.[5]

The court's task now is to determine the appropriateness of an award of damages under Mass. Gen. L. ch. 93A and the amount properly to be awarded, if any.

III. CONCLUSIONS OF LAW

Preliminarily, the court rejects defendant's argument that the 93A claim in this case is preempted by the Carmack Amendment. The Carmack Amendment only provides a remedy for damages arising from the loss of goods during transport. In the November 21, 1994 ruling on defendant's motion for summary judgment on this point, the court found that plaintiff's claims under 93A were based on alleged misconduct by United not undertaken in the course of transporting goods. As with the common law counts, the scope of

[5] The jury found Rini 30% contributorially negligent on the negligence claim. This finding does not affect the damage award, however, since Rini is entitled to full damages on the misrepresentation claim.

the 93A count was further constricted at trial: only conduct by United taking place *after* the incomplete shipment of the goods to Northampton, occurring during the claims process, has been considered by this court as a basis for the 93A claim.

Having established that the 93A claim is outside the Carmack Amendment's preemptive reach, the court must address this claim from two angles. First, is defendant exempt from the statute's reach? Second, if so, do defendant's actions justify an award of damages under 93A?

A. *Exemption under § 3 of Mass. Gen. L. ch. 93A*

United maintains that the transactions at issue in this case are subject to the regulatory authority of the Interstate Commerce Commission and are therefore exempted under § 3 of Mass. Gen. L. ch. 93A. Section 3 provides:

> Nothing in this chapter shall apply to *transactions or actions otherwise permitted* under laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth or of the United States.
>
> For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.

(Emphasis supplied).

Defendant's burden is heavy. To sustain it, "a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive." *Bierig* v. *Everett Square Plaza Associates*, 34 Mass. App. Ct. 354, 367 n.14 (1993), quoting Greaney, Chapter 93A Rights and Remedies 6-4 (1992). The rationale behind the exemption is to ensure that a business is not subjected to 93A liability if it relies on activity permitted by law. [6]

To determine whether defendant's actions are exempt, the

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[6] *See. e.g., Ward* v. *Dick Dyer & Assoc. Inc.*, 403 S.E.2d 310 (S.C. Ct. App. 1987).

court must first examine the "transactions or actions" at issue. Here, Rini submits that they are defendant's actions in the claim settlement process, including: United's decision to deny her claim; United's inadequate investigation of her claim; United's intentional misrepresentations during the claims handling process; United's refusal to offer any compensation in response to her 93A demand letter, and United's decision to seek declaratory judgment.

Defendant maintains that its "actions" are not only permitted but required by the rules and regulations of the I.C.C. implementing the provisions of the Interstate Commerce Act and published in United's tariffs filed with the I.C.C. In fact, these regulations permit no such activities.[7] There is no regulation or agency that permits a common carrier to mislead its customers in the claims settlement practices. *But cf. Bierig*, 34 Mass. App. Ct. 354 (1993) (landlord exempt from 93A liability in suit brought by tenants for excessive rent because the rents charged were expressly permitted by a regulatory scheme).

Defendant relies heavily on *Carr* v. *United Van Lines Inc.*, 345 S.E. 2d 734 (S.C. Ct.Ap. 1986). *Carr* has no persuasive force, however, and in fact lends further support to Rini's position. In *Carr*, plaintiffs alleged that a provision in their shipping agreement was deceptive in violation of the South Carolina Trade Practices Act. However, in *Carr* the very contractual provisions that gave rise to Carr's alleged cause of action were taken directly from tariffs approved by the I.C.C. As such, the court held that because the conduct was specifically authorized and permitted under regulation and tariffs administered by the I.C.C., the transaction was exempt from liability under the South Carolina statute. *Carr*, 345 S.E. 2d at 737.

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[7] Concededly, the I.C.C. does require that claims be "promptly and thoroughly" investigated. But this overlapping regulatory requirement, which in any event was not remotely satisfied, can hardly be described as "affirmatively permitting" the abuse meted out to plaintiff here.

It is clear that the I.C.C. does regulate many areas for motor carriers. However, as Justice Greaney has pointed out, the mere existence of a regulatory statute does not preclude the applicability of a broader nonconflicting statute such as 93A. *See also DePasquale* v. *Ogden Suffolk Downs, Inc.*, 29 Mass. App. Ct. 658, 662 (1990). In fact, the activities at issue here are of a different kind and character than those regulated by the I.C.C. *See Tousley* v. *North American Van Lines. Inc.*, 752 F.2d 96, 104 (4th Cir. 1985) (carrier's transactions were subject to state unfair practices statute even though it was also subject to regulation by the I.C.C.).

United's trade practices during its claims settlement process are not exempt from the reach of § 3 of Mass. Gen. L. ch. 93A. The activities at issue are not specifically or even generally permitted by any regulatory authority. As such, 93A is an appropriate remedy.

B. *93A Violation and Multiple Damages*

Chapter 93A, § 2(a) makes unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce." To establish unfair and deceptive trade practices, plaintiff must show that defendant's conduct fell within "the penumbra of some common-law, statutory or other established concept of unfairness, or was immoral, unethical, oppressive or unscrupulous." *Cambridge Plating Co. Inc.* v. *NAPCO, Inc.*, 876 F. Supp. 326, 336 (D.Mass. 1995) (citation omitted).

United failed to conduct a thorough, fair and unbiased investigation. It made intentional misrepresentations to the effect that it was directing such an investigation, when in fact it was conducting a sham designed to wear plaintiff down and force her to abandon a legitimate claim. It refused to make any offer in response to Rini's 93A demand letter, and it persisted in incessant demands for non-existent documentation in the teeth of its own expert advice.

Whether considered singularly or cumulatively these acts were taken in bad faith and were unethical. They are more than sufficient to warrant a finding of unfair and deceptive trade practices in violation of 93A.

Chapter 93A, § 11 compels an award of "up to three, but not less than two, times" actual damages if the court finds that defendant's practices were a "willful or knowing violation." The multiple damages provision is intended to "deter businesses from knowingly engaging in deceptive trade practices by increasing the magnitude of potential liability and providing an incentive to victims of such practices to avail themselves of these legal remedies." *Computer Systems Engineering, Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1378 (D. Mass. 1983). This section also seeks to promote reasonable settlements, *see Nader* v. *Citron*, 372 Mass. 96, 100 (1977), and to make it "unprofitable" for a defendant to ignore meritorious claims. *International Fidelity Ins. Co.* v. *Wilson*, 387 Mass. 841, 857 (1983) (citation omitted).

The term " 'willful', is most reasonably interpreted as referring to a state of mind existing at the time of acting — a state of mind involving 'culpability' at least . . . ." *Qantel*, 571 F. Supp. at 1374; *Cf. International Fidelity*, 387 Mass. at 853, 856 (1983).[8] Hartman's 1991 notation to "maintain denial" of Rini's claim before it had even been assessed, and defendant's continued denial of her claim even though the inventory sheets clearly indicated that boxes were missing was (1) knowingly designed to be unfair and deceptive and (2) a willful violation of 93A designed to erode her morale. The court can only wonder at the number of other legitimate claimants whose efforts at redress have been defeated by these tactics.

Having found a willful or knowing violation of 93A, it is within this court's discretion to award anywhere from double to treble the actual damages. *International Fidelity*, 387 Mass. at 853; *Cambridge Plating*, 876 F. Supp. at 346. The decision

[8] In *International Fidelity*, the court observed: Chapter 93A ties liability for multiple damages to the degree of the defendant's culpability by creating two classes of defendants. The first class is those defendants who have committed relatively innocent violations of the statute's substantive provisions. These defendants are not liable for multiple damages. The second class is those defendants who have committed "willful or knowing" violations. 387 Mass. at 853 (citation omitted).

is to be "[b]ased on the egregiousness of [the] defendant's conduct." *Brown* v. *LeClair*, 20 Mass. App. Ct. 976, 979 (1985). Rini relied on United, and United deceived and manipulated her. More than four years after losing Rini's art work, United aggressively contested her claim at every stage of the pretrial and trial process, forcing the expenditure of substantial attorney and expert fees. Unless deterred, United will not alter its egregiously unfair tactics. Given the degree of culpability, this court will award treble damages under 93A.

Courts have also awarded treble damages where, as here, there has been a bad faith settlement offer. *See Heller* v. *Silverbranch Const. Corp.*, 376 Mass. at 621, 628 (1978); *LeClair*, 20 Mass. App. Ct. at 979; *Brandt* v. *Olympic-Const., Inc.*, 16 Mass. App. 913, 916 (1983). The conduct proscribed by 93A is as much the failure to make a reasonable settlement offer as it is a substantial violation of the statute. *International Fidelity*, 387 Mass. at 857. The court's finding of bad faith in responding to plaintiff's demand letter constitutes further grounds to award treble damages. *See LeClair*, 20 Mass. App. Ct. at 979.

As noted above, the jury awarded the plaintiff $100,000 in damages for injury suffered by her as a result of the defendant's negligence and misrepresentation during the claims process, finding that this injury was separate from injury arising from the loss of her goods. This court agrees with the jury that $100,000 is a fair and reasonable award of damages for defendant's unfair and deceptive practices during the claims process. For the reasons set forth above, this amount will be trebled. Since the award of damages by the jury on the negligence and misrepresentation claims covers the same injury as the award of damages by this court on the 93A claim, the court will award only $300,000 to compensate plaintiff for all injuries suffered by her in the claims process.

The award of $50,000 in damages under the Carmack Amendment is not subject to trebling. Since these damages in no way duplicate the award of damages under ch. 93A, the court will order entry of judgment for the plaintiff in the

total amount of $350,000 for all her injuries. As noted above, plaintiff is also entitled to reasonable attorneys' fees and costs incurred with respect to the 93A and Carmack Amendment claims, as well as pre-judgment interest on a portion of her claims. These will be addressed in a separate memorandum.

IV. CONCLUSION

For the reasons set forth above, the court will order entry of judgment against United in the sum of $350,000.00. A separate order will issue.

s/Michael A. Ponsor

Michael A. Ponsor
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-2334

JANE RINI,
PLAINTIFF, APPELLEE,
v.
UNITED VAN LINES, INC.,
DEFENDANT, APPELLANT.

BEFORE
TORRUELLA, *Chief Judge,*
COFFIN, CAMPBELL, CYR, *Senior Circuit Judges,*
SELYA, BOUDIN, STAHL & LYNCH, *Circuit Judges.*

ORDER OF THE COURT
ENTERED: FEBRUARY 19, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

IT IS ORDERED that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

WILLIAM H. NG, CLERK

BY: GRACE M. O'NEIL
Chief Deputy Clerk

MESSRS. GLEASON, WRIGHT, PUCCI & CHUSED